Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-783

FRANCIS McCARTHY, *Appellant*

v.

PHILADELPHIA CIVIL SERVICE COMMISSION, *Appellee*

MOTION TO DISMISS OR AFFIRM

On Appeal from the Commonwealth Court of Pennsylvania

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-783

Francis McCarthy, *Appellant*

v.

Philadelphia Civil Service Commission, *Appellee*

MOTION TO DISMISS OR AFFIRM

On Appeal from the Commonwealth Court of Pennsylvania

The Appellee moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Commonwealth Court of Pennsylvania on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Philadelphia Civil Service Commission (App. A in Jurisdictional Statement), and the opinion of the Court of Common Pleas of Philadelphia County (App. B) have not been reported. The decision of the

Commonwealth Court of Pennsylvania (App. C) is reported at 339 A.2d 634 (1975). The denial of Allocatur by the Supreme Court of Pennsylvania (App. E) has not been reported.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a municipality may prescribe as a qualification for employment an appropriately-defined and uniformly applied bona fide continuing residency requirement?

II. Whether a constitutional question is presented concerning the administrative process where the record discloses that the Philadelphia Civil Service Commission's decision was adduced from the Appellant's own testimony?

COUNTER-STATEMENT OF THE CASE

This is an appeal from the judgment of the Commonwealth Court of Pennsylvania affirming the decision of the Philadelphia Civil Service Commission to suspend and dismiss the Appellant from his position as Fire Lieutenant in the Philadelphia Fire Department for violating an Ordinance[1] requiring Civil Service employees to maintain their bona fide residence in the City of Philadelphia.

The Philadelphia Civil Service Commission found that the Appellant was not a bona fide resident of the City of Philadelphia. The basis of this finding was the following:

In November of 1971, the Appellant's wife and family left their Philadelphia residence and moved to Villas, New Jersey. On September 14, 1972, the Appellant sold his house in Philadelphia. Thereafter, the Appellant maintained that he lived in a room at his mother's house in Philadelphia during his tours of duty with the Fire Department, while travelling to Villas, New Jersey on weekends and days off to be with his wife and family. Although the Appellant still voted, received mail and slept two nights per week at his mother's house, the record also shows that he did not pay rent for his room; that he spent two nights per week in Villas, New Jersey; that he was co-owner with his wife of their home in New Jersey; that his children attended local schools in New Jersey; that the appellant was the sole support of his wife and family and that the appellant was still maintaining the marital relationship with his wife.

Although the Appellant attempted to argue that he was in fact maintaining his bona fide residence at his mother's house in Philadelphia, the evidence adduced

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1. The pertinent provisions of the Philadelphia Home Rule Charter §7-401(u), the Philadelphia Code of Ordinances §20-101 and Philadelphia Civil Service regulations 30.01 are set forth in the Appellant's Jurisdictional Statement at pages 3 and 4.

at the hearing before the Civil Service Commission substantially demonstrated that it was reasonable for the Commission to conclude that the domicile of the appellant was in New Jersey.

The decision of the Civil Service Commission upon a timely appeal to the Common Pleas Court of Philadelphia County was affirmed.

An appeal was taken to the Commonwealth Court of Pennsylvania which also affirmed the Commission's decision. Thereafter, appellant petitioned the Supreme Court of Pennsylvania for allocatur, but his request was denied.

Reasons For Dismissing Or Affirming The Appeal

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

I. A Municipality May Prescribe as a Qualification for Employment an Appropriately Defined and Uniformly Applied Bona Fide Continuing Residency Requirement.

The validity of municipal employee residence requirements has been upheld by a majority of state Courts.[2] In all of the state cases where residency requirements for municipal employment were considered, a rational basis test was applied to one or more legitimate state purposes, and hence all were held constitutional under the traditional equal protection test.

While appellant herein would urge this Court to view a municipal ordinance requiring municipal employees to maintain their bona fide residences within the City

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2. *Abrahams v. Civil Service Commission of the State of New Jersey and the City of Newark*, 65 N.J. 61, 319 A.2d 483 (1974); *Ector v. City of Torrance*, 108 Cal. Rptr. 849, 514 P.2d 433 (1973), *cert. den.*, 415 U.S. 935 (1974); *Hattiesburg Firefighter Local 184 v. City of Hattiesburg*, 263 So.2d 767 (Miss. 1972); *Jackson v. Firemen's and Policemen's Civil Service Commission of Galveston*, 446 S.W. 2d 416 (Tex. 1971); *Detroit Police Officers Association v. City of Detroit*, 385 Mich. 519, 190 N.W. 2d 97 (1971), *appeal dismissed for want of a substantial federal question*, 405 U.S. 950 (1972); *Williams v. Civil Service Commission of Detroit*, 383 Mich. 507, 176 N.W. 2d 593 (1970); *Salt Lake City Firefighters Local 1645 v. Salt Lake City*, 22 Utah 2d 115, 449 P.2d 239 (1969); *Kennedy v. City of Newark*, 29 N.J. 178, 148 A.2d 473 (1959).

Contra see, *Donnelly v. City of Manchester*, 111 N.H. 50, 274 A.2d 789 (1971); *Fraternal Order of Police v. Hunter*, 36 Ohio Misc. 103, 303 N.E. 2d 103 (1973).

as an unconstitutional violation of his right to travel[3], several state courts have flatly rejected this argument and have held that a continuing residence requirement does not impinge on an individual's right to travel.

For example, the New Jersey Supreme Court in *Abrahams, supra,* and the Supreme Court of California in *Ector, supra,* decided that a continuing bona fide residency requirement for municipal employment did not violate the constitutional rights of the employees. By distinguishing a bona fide continuing residence requirement from a pre-qualifing durational residence requirement, both state courts were heeding the admonition of this Court expressly stated in *Dunn v. Blumstein,* 405 U.S. 330 (1972) and *Maricopa, supra.* In those decisions this Court stated:

> Our decision in [*Shapiro*] was not intended to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements. 405 U.S. 330, 342, Note 13; 415 U.S. 255.[4]

Both the New Jersey and California Courts noted that in today's crisis of cities, it was legitimate interest of a City to promote residency of its employees.[5]

3. In support of this conclusion, appellant places great reliance on the case of *Shapiro v. Thompson,* 34 U.S. 618 (1969). However, appellant misconstrues the meaning of the right to travel when he applies a literal translation to the phrase. The right to travel does not mean "merely movement." *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 255 (1974). Rather, as this Court explained in *Shapiro,* the right to interstate travel is synonomous with the "right to migrate, resettle, find a new job and start a new life." 394 U.S. 629.

4. Indeed, in view of this Court's opinions in *Village of Belle Terre v. Borass,* 416 U.S. 1 (1974) and *Sosna v. State of Iowa,* — U.S. —, 42 L.Ed. 2d 532 (1975) the right of the state to impose reasonable restrictions on even the migratory right of travel is recognized.

5. See, *Ector, supra,* 514 P.2d at 436, and *Abrahams, supra,* 319 A.2d 488-489.

When confronted with an identical interpretation of the phrase "right to travel" as appellant argues in this appeal, the Supreme Court of California aptly described the claim as "right to commute" rather than the "right to travel", and accordingly rejected the constitutional objections therein. 514 P.2d at 436. Likewise, this Court should refuse to recognize appellant's asserted constitutional right of travel from his place of employment to his home in the suburbs.

It would seem that state courts which have upheld the validity of ordinances requiring residence as a condition of municipal employment are consonant with emerging trends in the Federal judiciary. This Court has on one occasion examined the substantive issues involved in this controversy and decided in favor of the appellee. In the case of *Detroit Police Officers Association v. City of Detroit, supra,* this Court dismissed a similar appeal from the Supreme Court of Michigan "for want of a substantial Federal question".[6] In that case the Supreme Court of Michigan upheld a city ordinance which unqualifiedly required its police officers to reside in the city. Subsequently, the United States Court of Appeals for the Seventh Circuit entertained a similar appeal attacking the constitutional sufficiency of a Chicago ordinance and police regulation requiring policemen to reside within the corporate limits of the City of Chicago. *Ahern v. Murphy,* 457 F.2d 363 (1972). Therein, the circuit court considered the question whether this Court's dismissal of the *Detroit Police Officers Association Case* was dispositive on the merits of the appeal then before them. The Seventh Circuit decided that this Court's dismissal of the appeal in the Detroit Police Officers Association case was equivalent to a decision on the merits and, accordingly, affirmed the District Court's decision upholding the ordinances' constitutionality.[7]

6. 405 U.S. 950 (1972).

7. This Court's decision in *Hicks v. Miranda,* — U.S. — 43 U.S.L.W. 4857 (U.S. June 24, 1975) supports the position that

While appellant will undoubtedly argue that there is a substantive difference between the duties of a policeman and a fireman, several courts in deciding residency cases have viewed their function and relationship to the municipal community in the same light.[8] Although appellees contend that the City of Philadelphia's residency requirement is constitutional with respect to all Civil Service employees, it is certain that this Court's decision in Detroit Police Officers Association is dispositive on the merits of this appeal.[9]

Appellant further argues that "the municipal employment residency requirement is an arbitrary wall erected around the City's boundaries which denies to nonresidents of the City equal protection under the law."[10] This is not the case. The City of Philadelphia's residency requirement for municipal employment is reasonably related to a desire to provide employment for those individuals who will demonstrate an interest in the City of Philadelphia, and to employ those citizens who will be most highly motivated to work for a better City and to enhance its overall environment. Residency in the City of Philadelphia seems such a small price to pay for the many benefits that municipal employees acquire when they accept employment with the City of Philadelphia.[11] Conversely, it can be argued that the City of Philadelphia has a responsibility to provide employment opportunity

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Note 7—*Continued*

dismissal of an appeal for want of a substantial Federal question is an adjudication on the merits.

8. *Jackson v. Wright*, 506 F.2d 900 (5th Cir. 1975); *Krzewinski v. Kugler*, 338 F. Supp. 492 (D. N.J. 197 where the Three-Judge District Court in applying a compelling interest test found that the job performed and the necessity of the services rendered to the community were the same for firemen and policemen.

9. See *Jackson v. Wright*, *supra*.

10. Jurisdictional Statement, p. 11.

11. Pension benefits, sick pay, vacation pay, competively high salary, civil service job security and benefits, group health insurance, etc.

for its own citizens before seeking employees outside the City limits.

One interesting illustration of the positive and substantial benefits of requiring employees to reside within the City was discussed by Justice Mosk in *Ector, supra* when he stated that a legitimate governmental purpose in fostering a bona fide residency policy was:

> . . . reduction of high employment rates of inter-city minority groups . . . 514 P.2d 436.

If the City of Philadelphia eliminates its residence requirement, minority employment would unquestionably be adversely effected. This follows from the fact that the residence rule does serve to foster minority employment at all levels of City government.[12] If employment was open to the surrounding communities, then it would be virtually impossible for minority groups to protect themselves from discrimination. This is especially true in a City such as Philadelphia where the proportion of minorities in the City is far greater than the proportion of minority individuals living outside the City limits.[13] Therefore, it can be easily discerned that there are positive and legitimate benefits to be derived from the City's residency requirement for municipal employees.

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12. The federal courts have recognized the importance of inter-city job opportunity. See *Harper v. Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D.C. Md. 1973), *aff'd. and mod. sub. nom. Harper v. Closter*, 486 F.2d 1134 (4th Cir. 1973); *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975); *Robinson v. Conlisk*, 385 F. Supp. 529 (N.D. Ill., 1974); *Crockett v. Green*, 385 F. Supp. 912 (E.D. Wis. 1975); *Dozier v. Chupka*, 395 F. Supp. 836 (S.D. Ohio, 1975).

13. Approximately 34.4% of Philadelphia's population is non-white while only 17.5% of population of the 8 county (Pennsylvania and New Jersey) Standard Metropolitan Statistical Area is non-white. These figures are from the 1970 Census.

II. No Constitutional Question Is Presented Concerning the Administrative Process Where the Record Discloses that the Philadelphia Civil Service Commission's Decision Was Adduced from the Appellant's Own Testimony.

In an appeal from an administrative agency such as the Philadelphia Civil Service Commission, a reviewing court must affirm the adjudication of the Civil Service Commission unless it shall find that the same is in violation of the constitutional rights of the appellant; that it is not in accordance with law or that any finding of fact made by the Local Agency and necessary to support its adjudication is not supported by substantial evidence. See *City of Philadelphia v. Evans*, 14 Pa. Comm. Ct. 1, 320 A.2d 418 (1974).

Plaintiff argues that his constitutional rights to procedural due process of law were denied by the Philadelphia Civil Service Commission in the instant case. To support this conclusion, the appellant introduced a specious argument that the Philadelphia Civil Service Commission based its decision on hearsay evidence obtained by a Fire Department investigative report.[14] The record of this case is devoid of any such notion. It is apparent that the Philadelphia Civil Service Commission based its opinion on the testimony of the *appellant* and not unsubstantiated hearsay. As the Opinion of the Commission indicates "the facts before [them] presented what can only be called a borderline situation." (App. A, page 21). Both the Common Pleas Court of Philadelphia County in its Opinion (App. B at p. 27) and the Commonwealth Court of Pennsylvania (App. C. at p. 33) also share the view of the Civil Service Commission that there was evidence both favoring and opposing the position of the appellant. However, the Civil Service Commission cut through the self-serving declarations of the appellant and looked to the acts and conduct of the appellant. Probably the most persuasive portion of the

14. See Jurisdictional Statement, pp. 12 and 13.

entire testimony that the appellant gave at the hearing before the Civil Service Commission were the facts that his wife and family lived in New Jersey; that his children attended local schools in New Jersey, and that the appellant was still maintaining the marital relationship with his wife. Regardless of whether appellant vigorously argues that his bona fide residence is in a room at his mother's house, the inferences to be derived from the above mentioned facts are very persuasive in affording a conclusion that the appellant was not a bona fide resident of the City of Philadelphia.

Since we have already discussed the constitutional issues involved, the question then becomes whether the findings of fact made by the Philadelphia Civil Service Commission are supported by substantial evidence. As this Court has previously stated:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (*Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)).

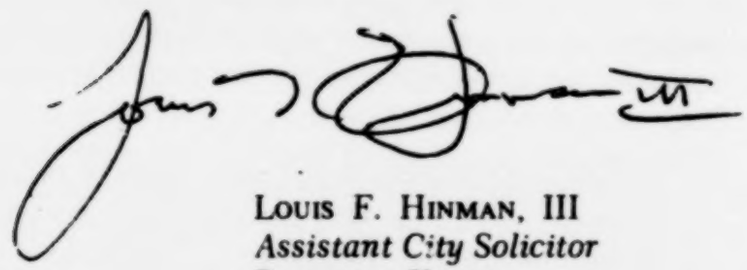
It is clear from a reading of the Opinion of the Philadelphia Civil Service Commission, its affirmance by the Common Pleas Court of Philadelphia County and upon review by the Commonwealth Court of Pennsylvania that the determination of appellant's bona fide residence was based on factual considerations derived from appellant's own testimony and not hearsay.

Therefore, the findings of the Civil Service Commission in the instant case should be upheld since there is substantial evidence to support them.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves this Court to dismiss this appeal or, the the alternative, to affirm the judgment entered in the Court by the Commonwealth Court of Pennsylvania.

Respectfully submitted,



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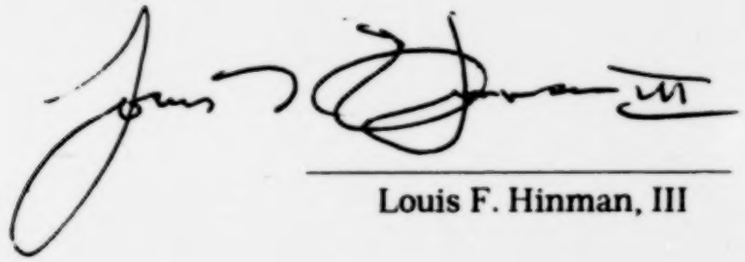
AFFIDAVIT OF SERVICE

I, LOUIS F. HINMAN, III, Assistant City Solicitor, Attorney for the appellee, in the case of Francis McCarthy v. Philadelphia Civil Service Commission, do hereby certify that a copy of the appellee's Motion to Dismiss or Affirm was mailed, by first class mail, postage pre-paid, to counsel for the appellant, William F. Coyle, Esquire, to his offices, 1430 Land Title Building, Philadelphia, Pennsylvania 19110, on January 6, 1976.



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